

ARTHUR A. PHILLIPS, )  
)  
Plaintiff )  
)  
v. )  
) CIVIL No. 02-179-P-C  
EMERSON ELECTRIC CO. AND )  
THE HOME DEPOT USA, INC., )  
)  
Defendants )

Plaintiff Arthur A. Phillips sued Defendants Emerson Electric Co. and The Home Depot USA, Inc., to recover for injuries he sustained while operating a Ridgid MS1250 compound miter saw manufactured by Emerson Electric and purchased from The Home Depot. Plaintiff alleges that a defective design in the saw permitted its retractable lower blade guard to come into contact with the blade during operation, which event led to his injuries. Defendants jointly move for summary judgment, contending that Plaintiff failed to produce admissible evidence of a feasible alternative design and that the opinions of Plaintiff's expert witness are excludable pursuant to the standards set out in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). I **RECOMMEND** that the Court **DENY** the Motion.

Summary judgment is warranted only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000). The following factual statement is drawn from the parties’ Local Rule 56 statements of material facts. The Court credits assertions of fact that are properly supported with citation to admissible record evidence, provided that such assertions are material or otherwise provide relevant background information. D. Me. Loc. R. 56. Where the parties’ properly supported factual assertions are in conflict, the Court resolves the dispute—solely for purposes of summary judgment—in favor of the non-moving party. Casas Office Machs. v. Mita Copystar Am., 42 F.3d 668, 684 (1st Cir. 1994).

Arthur Phillips has been a carpenter in the construction industry for over thirty years. (Pl.’s St. of Mat. Facts, “PSMF,” ¶ 1.) During this time he has operated many different brands and models of compound miter saws. (Id., ¶ 2.) He considers himself knowledgeable and skilled in the proper and safe operation of many different types of compound miter saws. (Id., ¶ 3.) On the day in question, Mr. Phillips was attempting to trim about a quarter-inch of material from the end of a window header using the Ridgid MS1250 compound miter saw. (Id., ¶ 5; Defs.’ St. of Mat. Facts, “DSMF,” ¶ 1.) Because of the size of the header, Mr. Phillips had to hold the saw’s clear plastic, lower blade guard up with his left hand in order to position the header underneath the saw blade. (DSMF, ¶ 2.) Mr. Phillips held the lower blade guard up at the 12 o’clock position with his gloved left hand. (DSMF, ¶ 3; PSMF, ¶ 6.) He then turned on the saw and the lower blade guard shattered. (DSMF, ¶ 4.) Mr. Phillips sustained a laceration to the area between the thumb and index finger on his left hand. (Id.) Mr. Phillips asserts

that his hand never moved from its position at the top of the saw. (Id., ¶ 5; PSMF, ¶ 10.) He also contends that his left hand never came into contact with the saw blade, but was lacerated by the shattered blade guard. (PSMF, ¶¶ 12, 15.) According to Mr. Phillips, the blade guard shattered the instant he energized the saw. (PSMF, ¶ 16.)

At Mr. Phillips's deposition, defense counsel insisted over objection that Mr. Phillips demonstrate on an exemplar saw how he had been holding the subject saw's lower guard when the accident occurred. Plaintiff's counsel objected to the demonstration because the exemplar saw defense counsel brought to the deposition was a Ridgid model 12501, whereas the subject saw was a Ridgid model 12500. According to Mr. Phillips, the lower blade guard of the deposition exemplar was different in shape from the lower blade guard of the subject saw. (PSMF, ¶ 18.) Defendants dispute this contention. According to Michael Gililland, the former Director of Product Safety for the Special Products Division of Emerson Electric Co., models 12500 and 12501 have identical lower blade guards. (DSMF, ¶ 18.)

Upon subsequent inspection of the subject saw, it was discovered that a screw holding a pivot plate to which the lower guard was attached was bent. (PSMF, ¶ 20.) Each party's expert surmises that the screw was loose at the time of the accident and that the looseness of the screw changed the axis of rotation of the lower blade guard, enabling its path of rotation to intersect with the rotational path of the saw blade. (PSMF, ¶¶ 21, 22, 30, 31; DSMF, ¶¶ 10, 11; Defs' Reply St. of Mat. Facts, "DRSMF," ¶¶ 21, 31; see also Goulet Depo. II at 6-7 & Gililland Depo. II at 10-11.) Mr. Phillips's expert, Ronald Goulet, would offer the opinion at trial that because the screw was loose, the saw's pivot plate loosened and enabled the lower blade guard to come out of alignment and come into

contact with the blade. (PSMF, ¶ 38.) Mr. Goulet further believes that the lower blade guard came into contact with the saw blade after the blade began spinning, rather than immediately upon being activated, as was suggested by Mr. Phillips. (DSMF, ¶ 12; Pl's Resp. to Defs' St. of Mat. Facts, "PRSMF," ¶ 12.) Mr. Goulet believes that Mr. Phillips sustained his injuries from contact with the blade after the blade destroyed the lower guard. (DSMF, ¶ 13; PSMF, 34.) Mr. Gililand, on the other hand, is of the opinion that the edge of Mr. Phillips's glove must have been in contact with the exposed saw blade when it was activated, that the revolving blade pulled Mr. Phillips's hand into its path and that this caused Mr. Phillips to release the lower blade guard, which rotated forward into the path of the blade and shattered after Mr. Phillips sustained his injury. (DRSMF, ¶¶ 23, 31; Gililand Depo. II at 10-11.)

Mr. Goulet would testify that the subject saw contains a design defect because it does not have a "positive locking device" to prevent the lower blade guard from coming out of alignment and coming into contact with the blade. (DSMF, ¶ 14.) He describes the condition in the guard as a dangerous susceptibility "to loosening displacement and contact with the blade." (PSMF, ¶ 37.) In his view, the pivot plate for the lower blade guard should be eliminated and the center of rotation for the blade located apart from the connection for the lower blade guard. This, says Mr. Goulet, would enable users to replace saw blades without having to remove the lower blade guard and would prevent users from misaligning the guard during reinstallation as a result of insufficiently tightening the guard's screw fasteners. (PSMF, ¶¶ 35, 36; PRSMF, ¶ 15.)

## Discussion

When evaluating the merits of a motion for summary judgment, the Court construes the summary judgment facts in the light most favorable to the non-moving party and indulges whatever reasonable inferences are raised on the non-movant's behalf. United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir. 2002).

Summary judgment is granted if the facts, so construed, show “that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Defendants argue that the record is devoid of admissible evidence that a feasible alternative design exists for the blade guard assembly on the subject saw. (Defs’ Mot. for Sum. J., Docket No. 14, at 1.) In addition, Defendants contend that Mr. Goulet’s methodology and qualifications do not meet the standards set by Daubert and its progeny. (Id.)

In Stanley v. Schiavi Mobile Homes, Inc., 462 A.2d 1144 (Me. 1983), the Law Court reviewed a pretrial dismissal of strict liability and warranty claims. The Law Court stated that a product design claim in Maine “will involve” an examination of (1) the utility of the product’s design, (2) the risk of the design and (3) the “feasibility of safer alternatives.” Id. at 1148. Defendants now maintain, based on Stanley, that proof of a feasible design alternative is a necessary element of a defective design claim in Maine, and not merely a factor to be weighed by the fact finder in the course of its deliberations. This is not an unreasonable interpretation of Stanley, given that the Law Court described its opinion as determining whether the plaintiff had “aver[red] facts which would entitle [her] to relief upon some theory or [had] assert[ed] every necessary element of a claim.” Id. at 1147.<sup>1</sup> This characterization of the issue suggests that the existence of a feasible

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<sup>1</sup> Subsequent Law Court opinions have not clarified this issue. In Guiggey v. Bombadier, 615 A.2d 1169 (Me. 1992), the Court reviewed a grant of summary judgment on a defective design claim, but it made

design alternative is a prerequisite to a defective design claim, not merely one factor that might be considered by the fact finder. Notably, Plaintiff does not argue that evidence of a feasible design alternative is not a required element of his claims. In the absence of such a contention, it is fair to treat the existence of a feasible design alternative as an element of Plaintiff's defective design claim, even if the Court is incorrect about the significance of Stanley. Furthermore, it is appropriate to apply this element equally to all of Plaintiff's claims. Id. (requiring proof of product's defect for both negligence and strict liability claims); cf. Guiggey v. Bombardier, 615 A.2d 1169, 1171-72 (Me. 1992) (applying product liability law's danger/utility test to product warranty claims). How much evidence is required to overcome a summary judgment challenge on this issue is a matter of first impression for Maine law.

At his second deposition, conducted by telephone on February 18, 2003, Mr. Goulet testified that he believed the saw was defective for failing to have what he called a "positive locking" feature. Counsel for Defendants then engaged Mr. Goulet in the following colloquy:

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no mention of alternative design as a necessary element of a prima facie case, perhaps because the claim was based on the seller's redesign of a snowmobile's original throttle configuration. Thus, the existence of a feasible design alternative was established by the original design. See id. at 1171-72. In St. Germain v. Husqvarna Corp., 544 A.2d 1283 (Me. 1988), the Law Court reviewed a directed verdict on a defective design claim and held that the trial testimony, which included testimony regarding the availability and cost of an alternative design, was sufficient to permit the claim to go to the jury. Id. at 1285-86. But whether these aspects of the plaintiff's proof were necessary elements of the claim was never explicitly stated in St. Germain. Compare Deluca v. Liggett & Myers, Inc., 2003 U.S. Dist. LEXIS 5938, \*26 (N.D. Ill. Apr. 7, 2003) (concluding that Illinois Supreme Court's description of feasible design alternatives as "pertinent evidence" did not require a showing of design alternatives in order to overcome summary judgment); French v. Grove Mfg. Co., 656 F.2d 295, 298-99 (8th Cir. 1981) ("It is apparent that [the statutory] definitions of the key terms in the strict liability statute contain no requirement that a feasible and safer alternative be proven by the plaintiff and we see no reason to impose that requirement. . . . Under Arkansas law the existence, practicality, and technological feasibility of an alternative safe design are not necessary elements of the plaintiff's cause of action, but rather are merely factors that may be considered by the jury in determining whether a product was supplied in a defective condition that rendered it unreasonably dangerous.").

- Q. Okay. So what specifically should the design have been in order to prevent [the screw from backing off enough to permit the lower blade guard to contact with the blade]? What changes should have been made in the design?
- A. I have not undertaken an analysis to determine how to incorporate a positive locking feature into the lower guard assembly.
- Q. And it is also true that you have not done any examination of any other miter saw in connection with your work in this case, is that still true?
- A. That's correct.
- Q. Okay. And you have not developed a design alternative which you believe would correct whatever defect it is that you believe to exist?
- A. Developed, no. Certainly I haven't developed anything.
- Q. All right.
- A. I can offer some ideas.
- Q. Well, I am interested in whether or not you have a specific design alternative that you can suggest in this case now, today.
- A. Well, I could—I would suggest they eliminate the pivot plate entirely by relocating the [center] of rotation of the blade so the guard doesn't need to be removed every time you want to replace the blade.
- Q. All right. That would be necessary then to rework the entire design, right?
- A. And it would completely eliminate any risk of any screws backing off and thereby causing the guard to interfere with the remaining machine element.
- Q. All right. At this point, you have not—you have not prepared and you are not prepared to propose those specific changes that ought to be made in your view, right?
- A. What I have tried to point out is I haven't done an analysis to develop a design alternative.

(Goulet Depo. II, pp. 30-31.) Thus, as of the close of discovery, Mr. Goulet offered what might be described as an alternative design concept, but had not drawn up any specific design that might have been incorporated into the subject saw.

Defendants argue that Dr. Goulet's failure to provide an actual alternative design and expert testimony regarding its feasibility is fatal to Plaintiff's claims. In response, Plaintiff has submitted with his responsive statement of material facts an affidavit from Mr. Goulet, dated March 13, 2003, to which is attached an exhibit suggesting three design alternatives "to mitigate the hazard associated with the loosening of the threaded fastener of pivot plate and guard assembly." (PSMF Exh. A, "Goulet Affidavit.")

Defendants assert that the affidavit and exhibit should be stricken for violating the discovery rules and this Court's scheduling order because "Mr. Goulet has significantly expanded the scope of his opinions long after the close of discovery." (Defs' Rep. Mem. of Law, Docket No. 23, at 1.) I agree. As of Mr. Goulet's second deposition, the discovery deadline had expired by some four days. Although it may have been permissible for the parties to consent to the late deposition, it is not permissible for Plaintiff to interject new expert opinions by Mr. Goulet in opposition to a summary judgment motion when Plaintiff had an obligation to provide those opinions in the context of discovery, prior to the summary judgment deadline, and in response to defense counsel's inquiries during Mr. Goulet's final deposition. For that reason, I **GRANT** Defendants' motion to strike Mr. Goulet's affidavit and attached exhibit from the summary judgment record.

Consequently, with respect to feasible design alternatives, Plaintiff must rely on Mr. Goulet's February 18, 2003 deposition testimony. The question becomes whether or



not Mr. Goulet's testimony is sufficient evidence for a fact finder to reasonably infer that a feasible design alternative could have eliminated the alleged dangerous condition at issue. Although it is not much, I consider Mr. Goulet's deposition testimony to provide some evidence of a design alternative, the feasibility of which might be reasonably inferred by the factfinder. According to Mr. Goulet, the alleged dangerous condition consists in a design that requires the user of the saw to remove and reinstall the lower blade guard every time the saw blade is changed. As a consequence of this design, a risk arises that the lower blade guard will not be securely reattached to the pivot plate on reinstallation and will be sufficiently loose for the guard to move into the rotational path of the saw blade. Mr. Goulet has proposed that this risk could be eliminated with a design that would permit the lower blade guard to remain fastened to the saw when the blade is replaced. In order to implement this design, Mr. Goulet would eliminate the pivot plate and provide the blade and lower blade guard with different axis points on the upper blade guard. This suggestion seems perfectly feasible as a matter of common sense, which the fact finder is free to employ in aid of its deliberations. See, e.g., Giles v. Miners, Inc., 242 F.3d 810, 813 (8th Cir. 2001) (finding that trial court's exclusion of expert testimony was within its discretion but observing that "the plaintiff must supply sufficient evidence to satisfy the trial court that the jury, with its common knowledge, could reasonably find an alternative design to be practical and feasible") (emphasis added); but see Stanczyk v. Black & Decker, Inc., 836 F. Supp. 565, 566-68 (N.D. Ill. 1993) (excluding expert testimony on Daubert grounds where proposed alternative design testimony was conceptual in nature). Although Mr. Goulet's testimony on this issue is conceptual in nature, its feasibility appears to be largely intuitive. In the absence of any

explanation from Defendants about why relocation of the lower blade guard screw fasteners is not feasible, I am not inclined to think that the feasibility of this alternative design cannot be assessed by the jury without the aid of elaborate expert testimony of the sort Defendants would insist upon.

Unlike this primary challenge, I do not consider the remainder of Defendants' arguments to warrant extended comment. Although there is cause for concern about what appears to be an inconsistency between Plaintiff's fact testimony and Mr. Goulet's opinion testimony on causation, I am not convinced that Mr. Goulet's causation opinion involves an ipse dixit or an "analytical gap" of the sort at issue in General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (reasoning that "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert" and that a court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").<sup>2</sup> Finally, I am of the opinion that Mr. Goulet's academic and professional credentials would qualify him to assist the fact finder in understanding the mechanical properties of the subject saw and how placement of the lower guard pivot point might create more or

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<sup>2</sup> The inconsistency at issue here arises from Plaintiff's testimony that his hand never moved from the 12 o'clock position throughout the accident and that he was cut by the blade guard rather than the saw blade. If the fact finder were required to treat this assertion as incontrovertible, then neither of the experts' opinions would "fit the facts." In my view, this issue relates more appropriately to Plaintiff's burden of proving the causation element of the pending claims rather than to the standards applicable to expert testimony under Federal Rule of Evidence 702. After all, a fact finder faces a peculiar predicament when it must discredit the plaintiff's own testimony in order to understand how his injuries arose. Nevertheless, a fact finder considering the facts and theories presented in this case might reasonably conclude that Plaintiff's left hand started in the 12 o'clock position, that the lower blade guard came into contact with the blade within a fraction of a second after the saw was turned on, that the lower blade guard was just as "instantly" torn away and that Plaintiff's left hand dropped down and forward slightly to connect with the saw blade at the front edge of the upper blade guard. When an accident transpires in a fraction of a second and involves a small range of motion, it is perhaps appropriate to loosely interpret words suggesting instantaneity or the absence of any appreciable movement. A fact finder might also reasonably rely on the presence of glove fibers in the blade rather than Plaintiff's unsubstantiated belief that the lower blade guard cut open his hand.

less of a risk of injury for consumers. Mr. Goulet need not have specific experience designing and manufacturing miter saws in order to competently discuss their mechanical properties and the impact of a simple design modification. And although Mr. Goulet has not offered admissible evidence of the cost of his alternative design, I would consider that to be but one factor impacting the issue of feasibility, not in itself an element of the claim.

### **Conclusion**

For the reasons stated herein, I **GRANT** Defendants' incorporated motion to strike Mr. Goulet's affidavit and attached exhibits, which were submitted by Plaintiff in opposition to Defendants' summary judgment motion.

### ***So Ordered.***

I further **RECOMMEND** that the Court **DENY** Defendants' motion for summary judgment.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: May 5, 2003

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Margaret J. Kravchuk  
United States Magistrate Judge

**TRIALLIST, MAGRECUSED, STANDARD, BANGOR**

**U.S. District Court  
District of Maine (Portland)  
CIVIL DOCKET FOR CASE #: 2:02-cv-00179-GC  
Internal Use Only**

PHILLIPS v. EMERSON ELECTRIC CO, et al

Assigned to: JUDGE GENE CARTER

Referred to:

Demand: \$0

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:1332 Diversity-Personal Injury

Date Filed: 08/21/02

Jury Demand: Both

Nature of Suit: 365 Personal Inj.

Prod. Liability

Jurisdiction: Diversity

**Plaintiff**

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**ARTHUR PHILLIPS**

represented by **JOSEPH H. GROFF, III**  
JENSEN, BAIRD, GARDNER &  
HENRY  
TEN FREE STREET  
P.O. BOX 4510  
PORTLAND, ME 04112  
775-7271  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

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**EMERSON ELECTRIC CO**

represented by **HARRISON L. RICHARDSON**  
RICHARDSON, WHITMAN,  
LARGE & BADGER  
465 CONGRESS STREET  
P.O. BOX 9545  
PORTLAND, ME 04112-9545  
(207) 774-7474  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**HOME DEPOT USA INC**

represented by **HARRISON L. RICHARDSON**  
(See above for address)  
*LEAD ATTORNEY*